357.

SUPREME COURT OF THE UNITED STATES.

No. 94.

JOHN PETERS & JOHN PETERS, JR., PLFFS.

VERSUS

THE WARREN INSURANCE COMPANY.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT, U. S. FOR THE DIST. OF MASSACHUSETTS.

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UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the District of Massachusetts, on Monday the fifteenth day of October, in the year of our Lord one thousand eight hundred and thirty-eight.

Before the Honorable JOSEPH STORY,
Associate Justice.
JOHN DAVIS,
District Judge.

Names of Parties.

JOHN PETERS and JOHN PETERS, JR., both of the city, county, and State of New York, and citizens of said New York, and of these United States, plaintiffs,

versus

The WARREN INSURANCE COMPANY, a corporation established in the District of Massachusetts, the members whereof are citizens of the United States, and of the Commonwealth of Massachusetts, defendants. In a plea of the case, &c.

Statement of the Case.

This was a case on a policy of insurance, dated the first of April, 1836, whereby the defendants insured the plaintiffs, for whom it may concern, payable to them, eight thousand dollars on the ship Paragon, for the term of one year, commencing the risk on the 15th day of March, 1836, at noon, at a premium of five per cent. The declaration alleged a loss by collision with another vessel, without any fault of the Master or crew of the Paragon; and also insisted on a general average and contribution.

The parties agreed that the verdict should be rendered by the jury for the plaintiff or for the defendants, according to the opinion of the court, upon the matters of law, arising upon the following statement of the facts of the case.

The plaintiffs are the owners of the ship Paragon, insured by the defendants in part.

On the 10th of November, 1836, said vessel sailed from Hamburgh, in ballast, for Gottenburgh, to procure a cargo of iron, for the United States.

Whilst proceeding down the Elbe, with a pilot on board, she came in contact with a galliot called Frau Anna, and sunk her. The Paragon lost her bowsprit, jib-boom and anchor, and sustained other damages, which obliged her to go into Cushaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburgh, for repairs.

Whilst lying there, the Captain of the Galliot libelled the Paragon in the Marine Court, alleging that the loss of the vessel was caused by the carelessness or fault of those on board the Paragon. The ship was arrested, but subsequently released on security being given by the agents of the owners, to respond to such damages as should be awarded by the court.

The Captain of the Paragon, in his answer, denied the charges of carelessness or fault on the part of those on board of his ship, and the court, after hearing the parties and their proofs, decided that the collision was not the result of fault or carelessness in either side, and that therefore, according to Article first, Title eight, of the Marine Law of Hamburgh, the loss was a general average loss, and to be borne equally by each party.

That is, the Paragon was to bear one half of the expence of her own repairs, and to pay one half of the value of the Galliot; and the Galliot was to bear the loss of one half of her own value, and to pay one half of the expence of the repairs of the Paragon. In conformity with this decision, a general average statement was drawn up by Mr. Oldermann, the Despacheur of Hamburgh, an officer appointed by law, and by whom alone such statements can be prepared.

In this statement are charged, first, the expences of repairing the Paragon, after making the deduction of one third new for old, saving one of her anchors and chains, which was lost at the time of the collision; wages and provisions of the Captain and the crew, during the detention, and the expences of surv*e*rs, protest, defending the suit, &c., amounting in all to about eight hundred dollars, and one half of which is charged to the Paragon, and one half to the Galliot.

Secondly, are charged the value of the Galliot, as by appraisal under an order of court, of her freight and cargo, the expenses of surv*e*rs, protest, prosecuting the suit, &c., amounting in all to about six thousand dollars, one half of which is to be charged to the Paragon.

The statement concludes thus: which according to the before mentioned ordinance relating to insurance and average, is to be borne by ship, cargo, and freight, as general average. The ship Paragon has to claim from the Frau Anna, for half the damages,

say - - - - - - -	$400
And the Frau Anna from the Paragon, one half the damages, say, - - - - - -	$3,000
So that the Paragon must pay - - -	$2,600

Which amount the Tribunal of Commerce decreed should be paid *instanter*.

The owners of the Paragon having no funds in Hamburgh, the Captain was obliged to raise the money on bottomry.

There being no cargo on board of the Paragon, and no freight earned, the ship has to bear the whole of the general average loss.

The cause was argued by F. C. Loring, for the plaintiffs, and by Parsons for the defendants.

Opinion of Mr. Justice Story.

And after a full hearing of the case, Mr. Justice Story declared, that in his judgment, the defendants are liable upon this policy for the contributory amount paid by the Paragon on account of collision, as a direct, positive, and proximate effect from the accident.

Points of Division of Opinion.

Judge Davis, (the District Judge,) was opposed to the opinion of Mr. Justice Story, on the following points and questions, viz:— Whether in this case the contributory amount paid by the Paragon on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy.

And the said Judges of said court being so opposed, in opinion upon the point and question aforesaid, at the request of the defendants, the same is stated by the said Judges, and under their direction as aforesaid, and is ordered to be certified under the seal of the said circuit court to the Supreme Court of the United States, at their next session, to be by the said court finally decided.

I, Francis Basset, clerk of the courts of the United States for the District of Massachusetts, hereby certify, that the foregoing is a true transcript of the record.

In testimony whereof, I have hereto set my hand, and affixed the seal of the said circuit court, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and thirty-nine, and in the sixty-third year of the Independence of the United States of America.

[SEAL.]

FRANCIS BASSETT, *Clerk.*